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No. CAPITAL CASE

In The

Supreme Court of the United States

KEVIN KEITH,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Third District

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

When a death-sentenced defendant discovers withheld evidence of his innocence, does a state court act contrary to this Court's decisions when it denies relief by relying on the sufficiency of the evidence presented at trial?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 2

1. The Crime 2

2. Keith's Trial 4

3. Counsel Learns of Withheld Exculpatory Evidence. 7

4. Ohio Courts Deny Relief, Relying on The Sufficiency of Evidence Presented at Trial. . 9

REASONS FOR GRANTING THE WRIT 10

I. The Ohio Court's Sufficiency Analysis Conflicts with *Kyles v. Whitley* and *Giglio v. United States*. 11

A. The Sufficiency Analysis for the *Brady* Claims Conflicts with *Kyles v. Whitley*. ... 11

B. The Sufficiency Analysis For the False-Testimony Claim Conflicts with *Giglio v. United States*. 13

II. No State Grounds Bar These Claims. 15

CONCLUSION 17

APPENDIX

Appendix A: Opinion of the Court of Appeals Third Appellate District Crawford County Ohio, dated December 1, 2008 . . . . . 1a

Appendix B: Opinion and Judgment Entry Denying Defendant Kevin Keith's Motion for Leave to File a Delayed Motion for New Trial and Opinion and Judgment Entry Denying Defendant Kevin Keith's Motion for Leave to Conduct Discovery and Denying Motion for New Trial and Denying Any and All Ancillary Motions, Court of Common Pleas Crawford County, Ohio, dated July 1, 2008 . . . . . 18a

Appendix C: Entry of Supreme Court of Ohio, dated December 2, 2009 . . . . . 33a

TABLE OF AUTHORITIES

Page(s)

Cases

Banks v. Dretke,
540 U.S. 668 (2004) 15, 16

Bracy v. Gramley,
520 U.S. 899 (1997) 16

Brady v. Maryland,
373 U.S. 83 (1963) ..... *passim*

Giglio v. United States,
405 U.S. 150 (1972) 10, 11, 13, 14

Kansas v. Marsh,
548 U.S. 163 (2006) 11

Kyles v. Whitley,
514 U.S. 419 (1995) 10, 11, 12

Napue v. Illinois,
360 U.S. 264 (1959) 9, 10, 14, 15, 16

Nix v. Whiteside,
475 U.S. 157 (1986) 13

Ohio ex rel. Steckman v. Jackson,
639 N.E.2d 83 (Ohio 1994) 15

Ohio v. Keith,
2008 Ohio 6187 (Ohio Ct. App., Crawford County Dec. 1, 2008) 10, 12, 13, 14

Strickler v. Greene,
527 U.S. 263 (1999) 11

United States v. Agurs,
427 U.S. 97 (1976) 13

Constitution

U.S. Const. amend. VIII 2

U.S. Const. amend. XIV 1

Statutes

28 U.S.C. § 1257(a) 1

O.R.C. § 149.43 15

PETITION FOR A WRIT OF CERTIORARI

Kevin Keith respectfully petitions for a writ of certiorari to review the judgment of the Ohio Court of Appeals.

OPINIONS BELOW

The decision of the Supreme Court of Ohio is reported at 917 N.E.2d 811 and is reproduced in the Appendix at 33a. The opinion of the state court of appeals is reported at 2008 Ohio App. LEXIS 5176 and is reproduced in the Appendix at 1a. The opinion of the trial court is reproduced in the Appendix at 18a.

JURISDICTION

The Supreme Court of Ohio declined jurisdiction on December 2, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

A. Fourteenth Amendment, which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

B. Eighth Amendment, which provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Thirteen years after Kevin Keith was convicted and sentenced to death, he discovered that a convicted murderer, Rodney Melton, had told an informant of his own plans to carry out the shootings in this case. Keith also discovered that the prosecution witness who resolved the disputed question of the killer's identity—shifting suspicion from Melton to Keith—does not actually exist. The Ohio courts relied on the sufficiency of the evidence at Keith's trial to deny his request for relief. Keith is scheduled to be executed on September 15, 2010.

1. The Crime

The truth of this crime begins with Rodney Melton's plan to punish Rudel Chatman for "snitching" about drug activity. In January 1994, Ohio police were investigating drug trafficking near Crestline, Ohio. Chatman was a police informant who led them to conduct a drug raid on January 21, 1994. Nine people were arrested.

Ten days later, Melton (a convicted murderer), stated his plan to exact revenge on Chatman for his "snitching." Melton told a confidential informant that he "had been paid $15,000 to cripple 'the man' who was responsible for the raids in Crestline, Ohio last week."

Ohio Board of Pharmacy Report, p. 11. And Melton's accomplice in a pharmacy burglary ring would later confirm to police that Melton was paid to kill Chatman.

Two weeks later, on the evening of February 13, 1994, a man with a mask over his mouth and nose (a type of mask that Melton was known to wear) entered an apartment where members of Chatman's family had gathered. This gunman then ruthlessly shot all six people inside. Three were killed: Marichell Chatman; her five-year-old daughter, Marchae; and Marichell's aunt, Linda Chatman. The other three victims survived: Richard Warren, Marichell's boyfriend; and Marichell's young cousins, Quanita and Quinton Reeves. Nancy Smathers, who lived nearby, saw a man run to light-colored car, get stuck in a snow bank, and then drive away.

Police arrived at the scene and committed themselves to the belief that Kevin Keith, who was one of the nine people arrested in the original drug raid, was the shooter. One of the officers specifically brought up Keith's name.

Melton also showed up at the scene after police arrived, and he made sure to tell the officers that his car—a car that matched the physical description given by witness Nancy Smathers—was broken down that night. Oddly, Melton also knew what type of bullets were involved in the killings.

Despite the officers' interest in Keith, the surviving adult, Richard Warren, told no less than four different witnesses—including a police officer—that he did not know who shot him.

The next day, however, the police provided Warren with a name array of four "Kevins." Not surprisingly, Warren chose one of the "Kevins" from the list (Kevin Keith). And despite Warren's statements at the scene that he couldn't see the shooter's face because his face was masked, the police presented Warren with a photo lineup. Picture number five, Keith's photograph, was a much closer-up image than the rest of the images. Warren picked Keith's face out of this lineup. Keith was then arrested.

Suggestions that police had the wrong man continued. Three days after Keith's arrest, seven-year-old Quanita Reeves told the police that she was shot by her "daddy's friend, Bruce." She also excluded the picture of Kevin Keith as the culprit. But young Quanita easily could have mixed up "Bruce" with his brother, Rodney Melton, who was also her "daddy's friend."

Yet the police and prosecution remained focused on Keith, and they put him on trial for the shootings. They kept the jury in the dark about the most damning evidence pointing to Melton.

2. Keith's Trial

Trial turned on one question: Who did it? The prosecution had to overcome some big obstacles to prove it was Keith. The gunman's face was covered, and the surviving witnesses could not identify him at the scene. Indeed, as noted, Quanita specifically excluded Keith as a suspect. Moreover, some facts that the jury heard pointed to Melton. But the prosecution would overcome these weaknesses in disturbing ways.

The jury never knew the following: that Rodney Melton told an informant just two weeks before the murders "that he had been paid $15,000 to cripple 'the man' [Chatman] who was responsible for the raids in Crestline, Ohio last week"; that Melton's accomplice in the burglary ring told police that Melton was paid to kill Chatman; nor that Melton was known to mask his face just as the shooter did. This information was withheld by the State.

With what information the defense knew at the time, there were reasons for the jury to at least consider Melton as the killer. For example, defense counsel had been contacted by one of Melton's relatives, who told him that Melton was "in on the killings." Also, a police officer testified that Melton showed up at the crime scene and knew the type of bullets involved in the killings. The jury also learned that Melton made efforts to tell the police that his car was broken down that night. And the jury heard about Quanita's statement that she was shot by her "daddy's friend, Bruce."

The jury further learned that Melton went to the hospital where Chatman was waiting to hear the status of his surviving relatives, and Melton told Chatman that the murders happened because of his snitching. Thus, the jury had some reason to believe that Melton, not Keith, shot Chatman's relatives, even though more-compelling evidence of Melton's guilt was kept from the jury.

Moreover, the prosecution's efforts to pin the murder on Keith faced a severe weakness: the police efforts to have Keith pointed out in the "all-Kevin"

name array and suggestive photo lineup would do little to credibly shift suspicion from Melton.

Keith moved the trial court to suppress the identification, due to the improper suggestion tactics used by the police to obtain it. But when the trial court denied Keith's motion to suppress, Keith called the police captain in his case-in-chief to let the jurors see for themselves what led to Warren identifying Keith.

One witness would ultimately shore up these obvious problems in the prosecution's case, changing the jury's focus from Melton to Keith. That witness was Nurse Amy Gimmets: the unbiased observer who tended to Richard Warren as he fought for his life at the hospital. According to the prosecution, Nurse Gimmets called the police on Warren's behalf and told the police captain about Warren's recollection of the name "Kevin."

The prosecution used this statement to rebut the assertion that the police improperly provided Warren with the name "Kevin." The police captain explained to the jury that it was only in response to Nurse Gimmets' crucial information that the police provided Warren the "all-Kevin" name array. Thus, with the nurse's unbiased account, the jury was able to resolve whatever doubts it harbored about the identity of the shooter. It must have been Keith.

Because Keith did not possess the damaging statements of Melton's guilt, the prosecution was able to characterize Melton's threats to Chatman as a friendly warning:

Q: (by Prosecutor) Isn't it true you warned Rudel to watch his back prior to these killings?

A: (by Rodney Melton) Yeah.

Q: You were concerned about his suspicious activity as an informant?

A: Yes, sir.

Q: Did you warn him that you were going to do him harm?

A: No, sir.

Tr. pg. 763.

The jury then convicted Keith and sentenced him to death for these horrific crimes. The jury never knew that Nurse Amy Gimmets didn't even exist. It never knew that the real nurse would have testified that Keith was not named as the shooter. It never knew that Melton was paid to kill Chatman. And it never knew that Melton was known to mask his face just as the shooter did. These facts—known to the prosecution and discussed in more detail below—were discovered years later.

3. Counsel Learns of Withheld Exculpatory Evidence.

Thirteen years after Keith's conviction, Keith's attorneys discovered that no person by the name "Amy Gimmets" has ever been employed by the hospital that treated Warren. In fact, Warren's actual attending nurse—Nurse Amy Whisman, who is listed as the

attending nurse on Warren's medical records *and in the testifying officer's police report*—disproves the claim by police that Warren independently supplied the name "Kevin." Nurse Whisman (now Petryk) swore in her affidavit: "I did not ask Richard Warren for the name of the person who shot him, and Richard Warren never told me the name." Petryk Affidavit. Nurse Whisman stated that she called the police to let them know that the victim had awoken but she did not give the police a name for the shooter. *Id.*

Keith's attorneys also discovered what the police already knew: Rodney Melton—the convicted murderer—likely committed this crime. Counsel obtained this information from the files of the Ohio Pharmacy Board, which was investigating Melton in an elaborate ring of burglaries at the time of the shootings. It was in those documents that counsel discovered the following facts that were never disclosed to Keith's jury:

- Two weeks before the shootings, Melton told a confidential informant "that he had been paid $15,000 to cripple 'the man' who was responsible for the raids in Crestline, Ohio last week."

- It was Melton's habit to wear the type of mask that covered his mouth and nose (in order to hide the distinguishing gap between his teeth), just as the shooter did.

- After Keith was arrested for the murders, Melton's accomplice in the pharmacy burglary ring told the police that Melton was paid to kill Chatman.

4. Ohio Courts Deny Relief, Relying on The Sufficiency of Evidence Presented at Trial.

On August 1, 2007, Keith filed a motion in the Ohio trial court for a new trial based on this withheld evidence, under Ohio Criminal Rule 33(A)(6). Keith's motion included two distinct federal claims: (1) the withheld evidence about Melton violated *Brady v. Maryland*, 373 U.S. 83 (1963), and (2) the false testimony about Nurse Gimmets violated *Napue v. Illinois*, 360 U.S. 264 (1959). On July 2, 2008, the trial court denied Keith's request.

On December 1, 2008, the state court of appeals affirmed, concluding that Keith was at fault for not having discovered and raised the evidence earlier. It also recited the *Brady* standard for assessing materiality of withheld evidence, but then concluded that relief was unwarranted because of the sufficiency of evidence presented at Keith's trial. The Ohio Supreme Court denied jurisdiction on December 2, 2009, because Keith's case did not involve a "substantial constitutional question."

REASONS FOR GRANTING THE WRIT

This Court has repeatedly admonished that it is improper to rely on the sufficiency of evidence at trial when assessing whether evidence discovered after the trial requires reversal. Rather, a reviewing court must assess whether the new evidence is material. For *Brady* claims (newly discovered evidence withheld by the prosecution), the court must reverse when there is a "reasonable probability that the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). For *Napue* claims (where the withheld *Brady* evidence is false testimony), the required showing of materiality is even lower: a reviewing court must assess whether there is "any reasonable likelihood" that the false testimony affected the verdict. *Giglio v. United States*, 405 U.S. 150, 154 (1972). As this Court explained in *Kyles*, "none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone." *Kyles*, 514 U.S. at 435, fn. 8.

But when rejecting Keith's claims regarding withheld *Brady* evidence (e.g., that Melton was paid to kill Chatman) and known false testimony (i.e., that Nurse Gimmets is a real person), the Ohio Court of Appeals relied on the prohibited sufficiency analysis: "[A] jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals." *Ohio v. Keith*, 2008 Ohio 6187, ¶34 (Ohio Ct. App., Crawford County Dec. 1, 2008); Pet. App. 16a.

This Court's "principal responsibility" and "primary basis" for reviewing state-court decisions "is to ensure

the integrity and uniformity of federal law." *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring). The Ohio courts' disregard of federal law here not only violates this uniformity but is setting up the execution of a likely-innocent man.

I. The Ohio Court's Sufficiency Analysis Conflicts with *Kyles v. Whitley* and *Giglio v. United States*.

A. The Sufficiency Analysis for the *Brady* Claims Conflicts with *Kyles v. Whitley*.

In *Kyles*, this Court held that the test for materiality under *Brady v. Maryland* "is not a sufficiency of evidence test." *Kyles*, 514 U.S. at 434. Rather, the question is whether there is a reasonable probability that the withheld evidence would have led to a different result at trial. *Id.*

This Court faced that issue directly in *Strickler v. Greene*, 527 U.S. 263 (1999), where the lower court used a sufficiency-of-the-evidence standard. The court below recited the proper materiality test, but relied on the following reasoning to reject a *Brady* claim: "[T]he record contained ample, independent evidence of guilt, as well as evidence sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty." *Id.* at 290. This Court held that it was improper to use this sufficiency standard. *Id.* at 291.

The Ohio Court of Appeals employed the same faulty analysis here. When reviewing Keith's *Brady* claim, the court recited the proper standard, but also relied on the conclusion that that the new evidence

was not material because "a jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals." *Keith*, 2008 Ohio 6187, ¶34; Pet. App. 16a.

The proper materiality analysis under *Kyles* would reveal that a new trial is required. As noted, the jury had some reasons to consider Melton as the killer, including his odd behavior at the crime scene and Quanita's identification of "Bruce," Melton's brother. But nothing at trial definitively suggested that he was the culprit. The new evidence contained in the Pharmacy Board reports would have done just that. Melton's statements that he was paid to kill Chatman would, in themselves, have changed the trial. And had the jury known that he masked his face in the same way as the shooter, the jury would have been able to put two and two together.

This evidence would have taken on particular meaning because Keith had an alibi supported by the trial testimony of two witnesses. Further, there was no forensic evidence conclusively linking Keith to the killings. And as the State's experts admitted at trial, because of the small area in which the victims were shot, the shooter likely would have had blood spatter on him. The experts testified that none of the forensic evidence collected linked Keith—or anything in his home—to the crime.

The withheld evidence about Melton creates a "reasonable probability" that the trial would have come out differently under *Kyles*. Had the Ohio court not tainted its analysis by looking to the sufficiency of the evidence at trial, it would have reached this

conclusion. Regardless, as discussed below, there can be no doubt that the outcome would have been different had the jury known that a key prosecution witness—Nurse Amy Gimmets—never existed.

B. The Sufficiency Analysis For the False-Testimony Claim Conflicts with *Giglio v. United States*.

The knowing use of perjured testimony is a *Brady* problem that is in a category of its own. "When the Court has been faced with a claim by a defendant concerning prosecutorial use of such evidence, it has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Nix v. Whiteside*, 475 U.S. 157, 185 (1986) (internal quotation marks omitted). This Court has established that a new trial is required if "the false testimony could in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154. The required showing of materiality is lower than a typical *Brady* claim because "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair." *United States v. Agurs*, 427 U.S. 97, 103 (1976).

Keith explicitly raised this claim in the Ohio courts. The Ohio Court of Appeals acknowledged as much: "Keith argue[d] that Captain Stanley must have lied when he testified that Gimmets told him that the victim stated 'Kevin' was the assailant." *Keith*, 2008 Ohio 6187, ¶30; Pet. App. 15a. It further accepted Keith's facts showing that the testimony regarding Nurse Gimmets was false: "[T]he fact that no 'Amy

Gimmets' worked at the hospital could have been discovered during that time." *Id.* The court then acknowledged that the actual nurse would have contradicted Stanley's testimony about their conversation, as it stated that "the nurse's identity could have been discovered during the course of the trial and used as impeachment." *Id.*

Yet the Ohio court improperly lumped this *Napue* false-testimony claim together with Keith's *Brady* claim. By doing so, the Ohio court relied on the same forbidden sufficiency analysis to dispose of this claim as well.

Relying on the sufficiency analysis is even worse in this context of false testimony, where the materiality standard is lower. And in Keith's case, it is a matter of life and death: Nurse "Amy Gimmets" shored up a fragile prosecution case that would have otherwise left the jury (properly) focused on Melton as the murderer. As the unbiased observer in this case, she relayed, through police testimony, the answer to the question at the heart of the case: The shooter must have been Keith. But the jury never knew that she didn't exist, and they certainly didn't know that the real nurse would have testified that Keith was never named as the shooter. The Ohio court should have simply asked whether this false testimony "could in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154. Had this proper question been asked, the obvious answer would have stood out: Of course it affected the jury—it changed the entire case.

II. No State Grounds Bar These Claims.

Before reaching the merits, the state court of appeals erroneously concluded that Keith's *Brady* and *Napue* claims were procedurally barred. The court stated that Keith should have discovered and raised these claims earlier. Pet. App. 14a-15a. That conclusion ignores this Court's jurisprudence.

It is not Keith's responsibility to seek out and present the evidence that the State suppressed from him. "A rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

Keith discovered the *Brady* evidence in the notes of the investigators who had been building a case against the Meltons for their pharmacy burglary ring. Before the Meltons' convictions were final, Keith could not have obtained the notes of the investigators. *See Ohio ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 94 (Ohio 1994) ("[I]nformation assembled by law enforcement officials in connection with a probable or pending criminal proceeding is, by the work product exception found in O.R.C. § 149.43(A)(2)(c), excepted from required release as said information is compiled in anticipation of litigation."). Moreover, Keith's counsel certainly had no access to the confidential informants who collected evidence against the Meltons, as their identities had not even been disclosed yet.

Additionally, defense counsel properly assumed that knowingly false testimony was not being presented in reference to the non-existent Nurse Amy Gimmets: "[I]t was appropriate for [Keith] to assume

that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction." *Banks*, 540 U.S. at 694. "Ordinarily, we presume that public officials have properly discharged their official duties." *Bracy v. Gramley*, 520 U.S. 899, 909 (1997).

In sum, there is no adequate state ground to bar Keith's federal claims under *Brady* and *Napue*. The question for this Court is whether the Ohio courts rejected those claims in a way that contradicts federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2010

APPENDIX

APPENDIX
TABLE OF CONTENTS

Appendix A: Opinion of the Court of Appeals Third Appellate District Crawford County Ohio, dated December 1, 2008 . . . . . 1a

Appendix B: Opinion and Judgment Entry Denying Defendant Kevin Keith's Motion for Leave to File a Delayed Motion for New Trial and Opinion and Judgment Entry Denying Defendant Kevin Keith's Motion for Leave to Conduct Discovery and Denying Motion for New Trial and Denying Any and All Ancillary Motions, Court of Common Pleas Crawford County, Ohio, dated July 1, 2008 . . . . . 18a

Appendix C: Entry of Supreme Court of Ohio, dated December 2, 2009 . . . . . 33a

APPENDIX A

COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY

CASE NUMBER 3-08-15

[Decided December 1, 2008]

STATE OF OHIO,	)
	)
PLAINTIFF-APPELLEE,	)
	)
V.	)
	)
KEVIN KEITH,	)
	)
DEFENDANT-APPELLANT.	)
	)

Appeal from Common Pleas Court.

Rachel Troutman, Assistant State Public Defender, Tyson Fleming, Columbus, OH, for appellant.

Clifford J. Murphy, Assistant Prosecuting Attorney, Bucyrus, OH, for appellee.

OPINION

PRESTON, J.

{¶ 1} Defendant-appellant, Kevin Keith (hereinafter "Keith"), appeals the Crawford County Court of Common Pleas judgment denying his motion to file a delayed motion for new trial and Crim.R. 33(A)(6) motion for a new trial. For the reasons that follow, we affirm.

{¶ 2} The relevant procedural history and facts of this case were set forth in this Court's prior opinion, *State v. Keith*, 176 Ohio App.3d 260, 2008-Ohio-741, 891 N.E.2d 1191 as follows:[1]

{¶ 3} In February 1994, the Crawford County Grand Jury indicted Keith on three counts of aggravated murder in violation of R.C. 2929.02, with capital-offense specifications, and on three counts of attempted aggravated murder in violation of R.C. 2903.01 and 2923.02, felonies of the first degree. The indictment arose from an incident during which Marichell D. Chatman, her seven-year-old daughter, Marchae D. Chatman, her cousins, Quanita M. Reeves and Quinton M. Reeves, her aunt, Linda Chatman, and Richard Warren were shot in Marichell's apartment. Marichell, Marchae, and Linda died as a result of the shooting, and Quanita, Quinton, and Richard were seriously injured.

{¶ 4} In March 1994, Keith entered a plea of not guilty to all counts in the indictment. In May 1994, Keith filed a notice of alibi. Additionally, the case

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[1] The Court notes that the recitation of facts and procedure was taken word-for-word from our prior referenced opinion, with the exception that additional facts and procedure were added as necessary for this opinion.

proceeded to a jury trial, at which the jury convicted Keith on all six counts of the indictment as charged and recommended the death penalty for the aggravated murder convictions.

{¶ 5} In June 1994, the trial court sentenced Keith to death on the aggravated murder convictions and to a 7- to 25-year prison term on each of the attempted-aggravated-murder convictions, to be served consecutively. Subsequently, Keith appealed his conviction and sentence.

{¶ 6} In April 1996, this court affirmed Keith's conviction and sentence, *State v. Keith* (Apr. 5, 1996), 3d Dist. No. 3-94-14, 1996 WL 156710, and also issued a separate opinion regarding Keith's death sentence in conformity with R.C. 2929.05(A). *State v. Keith* (1996), 3d Dist. No. 3-94-14, 1996 WL 156716. Subsequently, Keith appealed to the Supreme Court of Ohio.

{¶ 7} In September 1996, while his direct appeal was pending, Keith filed his first petition for postconviction relief in the trial court, alleging that he had been denied effective assistance of counsel and attaching numerous exhibits that were not part of the trial record.

{¶ 8} In December 1996, Keith filed a supplemental petition for postconviction relief, in which he alleged ineffective assistance of counsel and requested an evidentiary hearing.

{¶ 9} In October 1997, the Supreme Court of Ohio unanimously affirmed Keith's conviction. *State v. Keith* (1997), 79 Ohio St.3d 514, 684 N.E.2d 47, reconsideration denied (1997), 80 Ohio St.3d 1450, 686

N.E.2d 276, certiorari denied (1998), 523 U.S. 1063, 118 S.Ct. 1393, 140 L.Ed.2d 652.

{¶ 10} In February 1998, the trial court denied Keith's first petition for postconviction relief, without granting an evidentiary hearing, in a 16-page opinion in which it addressed all of his arguments, as well as each of his attached exhibits, and concluded that his petition lacked merit.

{¶ 11} In March 1998, Keith appealed the trial court's denial of his first petition for postconviction relief.

{¶ 12} In August 1998, this court affirmed the trial court's denial of Keith's first petition for postconviction relief. *State v. Keith* (Aug. 19, 1998), 3d Dist. No. 3-98-05, 1998 WL 487044.

{¶ 13} In September 1999, Keith filed a habeas corpus petition in the United States District Court, presenting eight grounds for relief.

{¶ 14} In June 2001, the United States District Court denied Keith's petition for habeas corpus. Thereafter, Keith appealed the denial and sought a certificate of appealability.

{¶ 15} In March 2003, the United States Court of Appeals granted a certificate of appealability on six of Keith's grounds for relief.

{¶ 16} In August 2004, Keith filed a second petition for postconviction relief with the trial court, setting forth three grounds for relief: (1) that the trial prosecutors did not timely provide defense counsel

with all relevant exculpatory evidence, (2) that new information received after the trial indicated that two persons were involved in the homicides and that there was another possible suspect, and (3) that the cumulative effects of these errors deprived him of fundamental fairness, resulting in his conviction and sentence being void or voidable. Keith submitted the following seven "exhibits" as documentary evidence in support of his petition:

> **Exhibits 1 and 2. "[T]he prosecutor had actual or constructive possession of police reports that memorialized that [sic] at least one eyewitness report that merely described a "pretty big guy with a mask". [Exhibit 1] This eyewitness makes a second statement after talking with Captain Michael Corwin wherein he claims that the person was Kevin Keith. [Exhibit 2] The first statement was never turned over to the defense." [By implication, the second statement was turned over to the defense.]**
>
> **Exhibit 3. "The prosecutor had actual or constructive knowledge that this eyewitness also stated that Kevin Keith was too big to be the shooter. [Exhibit 3] This information was not turned over to the defense."**
>
> **Exhibit 4. "The prosecutor presented John Foor as a witness in rebuttal. Foor testified that Richard Warren wrote the name "Kevin" on notepaper, but that he did not keep that paper. (T. 778-780) No notes were turned over to the defense. Six**

pages of notes actually existed. [Exhibit 4] These notes reveal the name "Kevin" in what clearly appears to be different handwriting from the rest of the writing, which obviously is Richard Warren's. The notes also reveal the name "Damon"- another person involved in drug sales in the area."

Exhibit 5. "The prosecutor had actual or constructive knowledge that Rodney Melton was under indictment from Crawford County for drug sales occurring on August 31, 1993. [Exhibit 5] The apparent informant in that case was Rudell Chatman. Chatman was the informant in a pending indictment Kevin Keith faced for drug sales alleged to have occurred on August 31, 1993. The State claimed the motive for the killings was the fact that Rudell Chatman informed on Keith. The prosecutor did not turn over any information regarding the fact that Rudell Chatman had also informed on Rodney Melton."

Exhibit 6. "New information received after the trial indicates that two persons were involved in the homicides."

Exhibit 7. "New information also indicates that the lead investigator helped Rodney Melton, a suspect in the crime, with clearing up some matter involving Melton living at the scene of the crime. No information was provided to the defense

about the ongoing relationship between the lead investigator and Rodney Melton."

Judgment entry at 17-18. Keith also requested that he be permitted to conduct discovery, that he be permitted to amend his postconviction petition upon completion of discovery, that his capital convictions and sentences be vacated and that an evidentiary hearing be conducted on the matter.

{¶ 17} In September 2004, the state moved for summary judgment against Keith's second petition for postconviction relief on the basis that all issues presented were barred by res judicata and because the petition was untimely pursuant to R.C. 2953.21.

{¶ 18} In July 2006, the United States Court of Appeals denied Keith's writ of habeas corpus. *Keith v. Mitchell* (C.A.6, 2006), 455 F.3d 662, petition for rehearing denied en banc (C.A.6, 2006), 466 F.3d 540, certiorari denied (2007), --- U.S. ----, 127 S.Ct. 1881, 167 L.Ed.2d 369.

{¶ 19} In February 2007, the trial court granted summary judgment in favor of the state and against Keith on his second petition for postconviction relief[2] and, alternatively, dismissed Keith's petition in a 35-page opinion, without permitting discovery or an evidentiary hearing. In doing so, the trial court stated:

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[2] The lengthy delay between Keith's second petition for postconviction relief and the trial court's judgment entry resulted from a stipulation between Keith and the state that the petition should be suspended pending a decision by the United States Court of Appeals on the writ of habeas corpus.

> **The essence of Kevin Keith's successor Petition for Post Conviction Relief is that the newly discovered evidence demonstrated in the proffered exhibits supports a collection of *Brady* violations, and that these exhibits, as a whole, support a theory of innocence. On this issue, this court finds that reasonable minds can come to only one conclusion-that being unfavorable to [Keith] and favorable to the State. This court finds that, on the face of the record the evidence offered by [Keith] fails to demonstrate substantive grounds for relief. This court notes that, according to the United States Court of Appeals for the Sixth Circuit, [Keith] does not contend that he is actually innocent.**

{¶ 20} In making this determination, the trial court cited "overwhelming evidence" against Keith, including the following:

> **1. Approximately 8 hours after the shootings, Richard Warren, while recovering from surgery, wrote the name "Kevin" on a piece of paper as the name of his assailant.**
>
> **2. Later in the day, Warren selected Kevin Keith from a photo array of six individuals.**
>
> **3. Investigators recovered a total of twenty-four cartridge casings from the**

crime scene area, which had all been fired from the same gun.

4. On the night of the murders, [Keith] picked up his girlfriend, from work at the entrance to the General Electric plant where another matched casing was found.

5. Nancy Smathers, a resident of the Bucyrus Estates, heard popping noises, looked outside her window on the night of the murders, and observed a large stocky man making his escape, whom she was able to identify six weeks later as Kevin Keith, from a television news story depicting [Keith].

6. The man Smathers identified jumped into a light-colored, medium-sized car, a description consistent with the automobile Kevin Keith was known to have had access.

7. Smathers witnessed a number of events: the car slid into a snow bank; the perpetrator got out to rock the car, but the dome light did not operate when the driver's door opened; the light for the license plate was out; the perpetrator was able to free the vehicle from the snow bank.

8. At the snow bank where Smathers witnessed the getaway car slide, investigators made a cast of the tire tread and of the indentation in the snow bank

made by the car's front license plate number-"043."

9. The indentation from the license plate matched the last three numbers of a 1982 Oldsmobile Omega seized from Melanie Davison shortly after she visited [Keith] in jail, under the pseudonym "Sherry Brown" a few weeks after the murders.

10. The Oldsmobile was registered to Alton Davison, Melanie's grandfather, and was also regularly used by Melanie. Alton Davison had put four new tires on the Omega six months prior to the murders. He estimated that by February 1994, the new tires had been driven less than 3,000 miles without any problems or need for replacement.

11. The cast taken of the tire tread at the crime scene did not match tires found on the Oldsmobile Omega one month later, but the cast did match the tread of the tires purchased by Alton Davison-this, based upon the tire brochures.

12. The tires found on the Oldsmobile Omega after the murders had been manufactured but a month before the murders.

13. It will be recalled that the perpetrator put a gun to Marichell's head, complaining bitterly about Marichell's brother "ratting on people." Rudel Chatman, the victim's

brother was a police informant in a drug investigation involving Kevin Keith. And the month prior to the murders, Keith was charged with several counts of aggravated drug trafficking.

14. The description of the vehicle by Nancy Smathers-a light colored, medium-sized car-generally fit the description of the Oldsmobile Omega owned by Alton Davison and frequently driven by his granddaughter Melanie, one of the girlfriends of Kevin Keith.

15. The description of the perpetrator by Nancy Smathers-a large, stocky black man-generally fits and continues to fit (from this court's observation of [Keith] at the hearing) [Keith].

16. It will be recalled that after drinking a glass of water through a pulled-up portion of a turtleneck sweater, the perpetrator pulled a nine-millimeter handgun from a plastic bag that he was carrying. Kevin Keith was seen earlier in the day in the neighborhood by a neighbor while he (Keith) was carrying a bag.

On March 15, 2007, Keith appealed the trial court's denial of his second post-conviction motion, which this Court affirmed on February 25, 2008. *Keith*, 2008-Ohio-741.

{¶ **21**} On August 1, 2007, while his appeal to this Court was pending, Keith filed a motion to file a

delayed motion for new trial and a motion for a new trial.

{¶ 22} On August 3, 2007, Keith filed a motion to re-open pursuant to App.R. 26(B) with this Court, which we denied. The Ohio Supreme Court affirmed our judgment on August 7, 2008. *State v. Keith,* 119 Ohio St.3d 161, 2008-Ohio-3866, 892 N.E.2d 912.

{¶ 23} On March 28, 2008, Keith filed a motion for an evidentiary hearing for his motion for new trial. On April 10, 2008, Keith filed an appeal of this Court's February 25, 2008 decision with the Ohio Supreme Court.

{¶ 24} On July 2, 2008, the trial court denied Keith's motion to file a delayed motion for new trial, motion for evidentiary hearing, motion for new trial, and any and all ancillary motions.

{¶ 25} On July 7, 2008, Keith filed an appeal of the trial court's denial of his motions with this Court. Keith now appeals this judgment asserting three assignments of error for review. We have elected to address these assignments of error collectively but out of the order listed in Keith's brief.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN APPLYING THE DOCTRINE OF RES JUDICATA TO APPELLANT'S CLAIMS.

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN EVALUATING AND DENYING APPELLANT'S MOTION FOR NEW TRIAL UNDER THE USUAL STANDARDS FOR NEW TRIAL, WHEN THE NEWLY DISCOVERED EVIDENCE WAS AVAILABLE TO THE PROSECUTION AND NOT SUBMITTED TO THE DEFENSE.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE ARBITRARY AND INACCURATE.

{¶ 26} In his second assignment of error, Keith argues that the trial court erred in finding that his claims were barred by the doctrine of res judicata. We disagree.

{¶ 27} Keith identified four allegedly new pieces of evidence in support of his Crim.R. 33(A)(6) motion for a new trial: (1) on January 31, 1994, Rodney Melton, a known drug dealer, told a confidential informant "that he had been paid $15,000 to cripple 'the man' who was responsible for the raids in Crestline, Ohio last week[ ]"; (2) the victim, Richard Warren, never told nurse "Amy Gimmets" that the assailant's name was "Kevin" because no "Amy Gimmets" ever worked for the hospital; (3) eyewitness Nancy Smathers' testimony indicates that the getaway car was "white, cream, light yellow" in color, which matches Melton's car, not the vehicle Keith allegedly drove; and (4) Melton's car tires were never analyzed to determine whether they had a similar tread design to that of the getaway car.

{¶ 28} With regard to Keith's contentions concerning Smathers' testimony, this could have been raised as an error on direct appeal or in his postconviction petition. Smathers testified at trial and her testimony appears in the transcript. As such, any error predicated upon this testimony is now res judicata. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. Furthermore, this Court notes that Melton testified at trial that he owned a "light tannish, cream" 1979 Chevy Impala; and therefore, this evidence was before the jury and was not new evidence as Keith alleges. (Jan. 17, 1995 Tr. Vol. IV at 675). As to Melton's tire tread matching that of the getaway car, this is an issue that could have been explored by defense counsel at trial. The State certainly would not have presented this evidence in a prosecution against Keith. Furthermore, this too could have been raised as an issue on direct appeal or, at the latest, in his *second* post-conviction petition and is now, therefore, res judicata. *Perry,* 10 Ohio St.2d 175, paragraph nine of the syllabus.

{¶ 29} Keith's first and second alleged new pieces of evidence are similarly barred under the doctrine of res judicata. In his second post-conviction petition, Keith argued that the prosecution knew that Melton had the same motive to commit the crime as he did but failed to disclose this information. (Doc. No. 116). Keith now claims to have more information implicating Melton and, thereby, exonerating him. The trial court denied Keith's post-conviction petition, and this Court affirmed. Accordingly, this issue has been argued before and is now barred. *Perry,* 10 Ohio St.2d 175, paragraph nine of the syllabus.

{¶ 30} Keith also alleges that hospital records reveal that no nurse by the name of "Amy Gimmets" has ever worked at the hospital where the victim was treated. Accordingly, Keith argues that Captain Stanley must have lied when he testified that Gimmets told him that the victim stated "Kevin" was the assailant. Keith filed a motion to suppress the victim's in-hospital identification, and the fact that no "Amy Gimmets" worked at the hospital could have been discovered during that time. Furthermore, the nurse's identity could have been discovered during the course of the trial and used as impeachment, or, at the latest, it certainly could have been raised on direct appeal or in one of Keith's post-conviction petitions. Under these circumstances, we find this issue barred as well. *Perry*, 10 Ohio St.2d 175, paragraph nine of the syllabus.

{¶ 31} For all these reasons, we find that the trial court did not err in concluding that Keith's arguments were barred by the doctrine of res judicata.

{¶ 32} In his first assignment of error, Keith argues that the trial court erred by failing to utilize the standards under *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 and instead used the traditional Crim.R. 33(A)(6) standard. Even if we were to agree with Keith's argument, he has failed to establish a *Brady* violation, because he has failed to show that the evidence was material.

{¶ 33} "The United States Supreme Court has held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad

faith of the prosecution.'" *State v. Grifin*, 3d Dist. No. 1-03-31, 2004-Ohio-287, ¶ 9, quoting *Brady*, 373 U.S. at 87. However, *Brady* does not apply "'unless the evidence is material to mitigation, exculpation or impeachment.'" *Griffin*, 2004-Ohio-287, at ¶ 9, quoting *State v. Keene* (1998), 81 Ohio St.3d 646, 693 N.E.2d 246, citing *Calley v. Callaway* (C.A.5, 1975), 519 F.2d 184, 221. "'[E]vidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Griffin*, 2004-Ohio-287, at ¶ 9, quoting *State v. Yarbrough* (Apr. 30, 2001), 3d Dist. No. 17-2000-10, at *8.

{¶ 34} The trial court found, and we agree, that there is no reasonable probability that the aforementioned evidence, if disclosed, would have changed the outcome. Much of the evidence was already presented at trial, if not directly at least inferentially. Furthermore, a jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals. This case was before this Court as recently as February 25, 2008 on Keith's second post-conviction petition. We were not persuaded then, nor are we now, that Keith has suffered prejudice sufficient to merit a reversal of the trial court's judgment.

{¶ 35} Finally, in his third assignment of error, Keith argues that the trial court's judgment was arbitrary and inaccurate. We disagree. Although the trial court made some apparent typographical errors, this does not mean that its decision was "arbitrary" as Keith argues. This Court has reviewed the trial court's judgment entry and finds that it is not arbitrary. This

Court also agrees with the trial court's judgment that Keith's claims are barred by the doctrine of res judicata, and, even if not barred, would not have changed the trial's outcome.

{¶ 36} Keith's first, second, and third assignments of error are overruled.

{¶ 37} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed.

WILLAMOWSKI and ROGERS, JJ., concur.

APPENDIX B

IN THE COURT OF COMMON PLEAS
CRAWFORD COUNTY, OHIO

CASE NO.: 94–CR–0042

[Dated July 1, 2008]

State of Ohio,	)
	)
Plaintiff—	)
	)
vs.	)
	)
Kevin KEITH,	)
	)
Defendant—	)
	)

JUDGE: THOMAS PATRICK CURRAN
On Assignment, Art. IV, Section 6
Ohio Constitution

OPINION AND JUDGMENT ENTRY DENYING DEFENDANT KEVIN KEITH'S MOTION FOR LEAVE TO FILE A DELAYED MOTION FOR NEW TRIAL

OPINION AND JUDGMENT ENTRY DENYING DEFENDANT KEVIN KEITH'S MOTION FOR LEAVE TO CONDUCT DISCOVERY AND DENYING MOTION FOR NEW TRIAL

AND DENYING ANY AND ALL ANCILLARY MOTIONS

This is a Death Penalty Case.

THIS IS A FINAL JUDGMENT

I. INTRODUCTION

The Defendant Kevin Keith has filed a "Motion for Leave To File A Delayed Motion For New Trial." The Defendant, tracking the language of Rule 33(B) of the Ohio Rules of Criminal Procedure, claims that he was "unavoidably prevented from discovering the evidence" upon which he relies until well after 120 days had elapsed from the date of the verdict. In fact, this court finds that the Defendant is unable to establish by clear and convincing evidence that he has been unavoidably prevented from discovering exculpatory evidence, much less has he been able to establish perjury on the part of police officers as he alleges. Criminal Rule 33(B) provides as follows:

> Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was

unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

This court has carefully reviewed the Defendant's motions, together with the points of law outlined in support thereof, and has concluded that the Defendant's manifold motions and arguments are but a variation of an identical theme arrayed in different motion practice, but thoroughly explored and rejected by this court and by the Court of Appeals *in the very recent past.* On February 13, 2007, this court filed an extensive Opinion and Judgment Entry that it authored granting the State's Motion for Summary Judgment on Kevin Keith's Successor Petition for Post Conviction Relief. In addition, this court dismissed the Petition, in the alternative, and also filed findings of fact and conclusions of law. At that time this court also entered an order denying discovery. From this Judgment Entry the Defendant—Petitioner secured new attorneys and proceeded to prosecute his appeal to the Ohio Court of Appeals for the Third District without success. But while that appeal was pending

before the Third District, the Defendant proceeded to engage in the instant motion practice.

II. PROCEDURAL HISTORY OF THE CASE

The procedural history of this case is extensive and has been thoroughly reviewed in this court's Judgment Entry of February 13, 2007, as well as the affirmance of the judgment by the Ohio Court of Appeals in State v. Keith. 2008-Ohio-741 (3d District, 2-25-2008). The defendant was convicted of the execution-style capital murder of Maricheil D. Chatman, her aunt Linda Chatman, and Marichell's seven-year-old daughter Marchae Chatman. In addition to these shooting victims, the defendant was also convicted of the attempted murder of Marchae's young cousins Quanita Reeves and Quinton Reeves and Richard Warren, the latter a house guest of Marichell at the time of the events. These three survivors, including a four-year-old, and a seven-year-old, were seriously wounded. The defendant was sentenced to death in 1994. Experienced trial counsel represented him at the trial, and with new and also experienced appellate attorneys, Kevin Keith embarked on a journey of appellate review, collateral state post conviction pursuits and federal habeas corpus—all without success. With yet another set of experienced professional attorneys, Kevin Keith seeks a new trial, based on newly discovered evidence. In fact, as will be explained, there is nothing new here.

III. EVIDENCE ON GUILT

With yet another set of experienced professional attorneys, Kevin seeks a new trial, based on newly discovered evidence. Evidence that Kevin Keith was

the person who committed these crimes has stood the test of time, and has survived multiple attacks from different sets of defense counsel engaging different theories—from essentially attacking the penalty phase of the jury trial, and fairly well conceding guilt, to new claiming innocence. Once again, but in brief, this court will recount the evidence supporting the jury verdicts in this capital murder case.

Richard Warren had been living with Marichell Chatman and her seven-year-old daughter Marchae for several weeks at Marichell's apartment complex known as the Bucyrus Estates. On the evening of February 13, 1994, shortly before nine o'clock in the evening, Richard Warren was watching television when a man appeared at the door, but began to walk away without knocking. Warren opened the door and the man turned and asked for Linda Chatman. Linda had arrived at the apartment but a few minutes earlier to retrieve her children Quanita and Quinton. Linda was the aunt of Marichell and Marichell had been baby sitting the children. When Linda went outside to speak with the man, Marichell told Warren the man's full name and mentioned that be had been involved in a drug bust. Warren could not remember his last name, but he did recall that his first name was "Kevin." After a short while, the man known as Kevin returned to the apartment with Linda. He drank a glass of water through a turtleneck sweater that had been raised above his mouth. He scolded Marichell for addressing him as "Kevin" when she asked him what he was doing and why. He pulled a nine millimeter hand gun from a plastic bag he was carrying, ordered everyone on the floor, put the gun to Marichell's head and remarked that her brother was "ratting" on people. Kevin began to fire-his weapon. Warren heard

as many as ten to 12 shots. Warren received three rounds —one in his jaw and two more in his back. He heard the door close and then escaped himself across a snow-covered field toward Ike's Restaurant. Four or five more shots were fired in his direction, one striking him in the buttocks and knocking him down. Somehow, Richard Warren—having now received a total of four rounds—survived to testify in court and to identify Kevin as Kevin Keith. In fact, he identified Kevin from a photo array submitted at the hospital, the day after the shootings. He also communicated the name "Kevin," upon recovering from surgery. But there was much more to the evidence than the mere identification of Kevin Keith by Richard Warren. The State established inferentially that Kevin Keith had access to the getaway car, a light colored medium sized vehicle, whose license plate included the numbers "043"—numbers imprinted in the snow bank at the Bucyrus Estates the night of the murders. Nancy Smathers, another resident of Bucyrus Estates, identified Kevin Keith as the driver of that vehicle, while he was stuck in the snow bank. Smathers bad heard "popping noises" at about nine o'clock in the evening. She saw a "stocky black man" running to the parking lot, getting into the vehicle, attempting to speed away, and then sliding into a snow bank. That Kevin Keith had access to this vehicle—plate number in part "043"—was established under a compelling set of circumstances. One of the Defendant's girlfriends visited Keith at the jail a few weeks after the murders, registering under the fictitious name of "Sherry Brown." Her real name: Melanie Dawson. Her vehicle: a light-colored 1982 Oldsmobile Omega owned by her grandfather. License plate's last three numbers: "043." The corroboration convincingly continues. Although Melanie's grandfather had purchased a full set of tires

only six months before the murders—tires whose tread pattern (from advertised brochures) matched casts taken by detectives in the snow, the vehicle was now equipped with four new tires, whose date of manufacture was but a month before the murders, meaning that a vehicle, whose set of tires were only in service for six months—less than 3,000 miles—was suddenly equipped with another new set of tires, whereas the owner of the vehicle would testify that he did not purchase the new tires and authorized no one else to do so; and that his granddaughter Melanie—the Defendant's girlfriend—was a regular user of this vehicle. Further supporting the theory that this was a one-person mass murder: all of the casings recovered from the crime scene were from the same nine-millimeter weapon. Some two-dozen casings were recovered. One such matched casing was recovered miles away at the entrance to a GE plant. It was established that Keith had picked up another girlfriend at the plant on the night of the murders. Finally, Kevin Keith was observed in the vicinity of the crime scene earlier in the day carrying a bag. Recall that the perpetrator pulled the weapon from a bag.

In its opinion affirming the conviction on direct appeal, the Ohio Supreme observed:

> The evidence supports beyond a reasonable doubt that appellant murdered Marichell, Marchae and Linda Chatman, and attempted to kill Richard Warren and Quanita and Quinton Reeves as part of a course of conduct involving the purposeful killing or attempt to kill two or more persons. R.C. 2929.04(A)(5).
>
> 79 Ohio St. 3d at 537

In brief, then, Kevin Keith had the motive,[1] the means, and the opportunity to have murdered three innocent victims, and to have attempted to murder three more innocent victims. Both direct and circumstantial evidence pointed to his guilt.

In response to the multiple claims that purport to support the Defendant's Delayed Motion For New Trial, the State has painstakingly recited—witness by witness—the evidence supporting the verdicts of capital murder. There is no need for this court to repeat that exercise. However it will be helpful to analyze the recent major contentions of the Defendant.

IV. THE DEFENDANT'S CLAIMS

The Defendant now claims that the positive identification of his guilt is unreliable. He proposes theories that the nurse treating Richard Warren is either a fiction or that the police gave false testimony about information the nurse allegedly communicated to the detectives. The Defendant also claims that one Rodney Melton "planned to cripple Rudel Chapman," and because Rudel's sister Marichell Chatman was one of the victim's of the killings at the Bucyrus Estates, this somehow points to the Melton brothers, known drug dealers, as the actual perpetrators of the Chatman murders. The Defendant theorizes in his Motion For A New Trial that the Pharmacy Board investigator describes him (Kevin Keith) as "the main cocaine supplier to the Meltons." A further part of the theory is the argument that if Kevin Keith had such a

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[1] It was established that Rudel Chatman, Marichell's brother, had been a police informant against Kevin Keith in a drug case.

well-documented "major role in drug trafficking" why would he have committed these murders if Rudel was "ratting" on him for the "small" amount of cocaine for which he was charged [?]"[2] Continuing with this collection of non-sequiturs, the Defendant adds that Bruce Melton offered to "bust a 'big cocaine dealer' from his county" at a time when Kevin Keith was already on death row for some 18 months. Finally, the Defendant now contends that Captain John Stanley must have lied on the witness stand about a certain telephone conversation he had with a recovery room nurse. According to Stanley the nurse told him that Richard Warren was awake, able to speak, and had mentioned the name "Kevin." According to Nurse Amy Wishman Padgett, in an affidavit filed with the instant motion, she did call the police department to advise the police that Warren was physically able to speak, but she did not hear him say "Kevin," did not ask him the identity of the perpetrator; and, for herself, did not want to know.[3] This collateral peripheral evidence is similar in import to the claim that the name "Kevin" in PCR Exhibit 4 does not appear to be in Richard Warren's handwriting, an issue thoroughly explored and explained in footnote 10 of this court's judgment entry dismissing Kevin Keith's Petition for Post

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[2] Kevin Keith was free on bond on the night of the murders, under a four-count drug trafficking indictment. Rudel Chatman had been working undercover in a covert drug operations unfit for the Galion Police Department and was largely credited, according to the evidence, with the filing of charges against Kevin Keith.

[3] But see the trial transcript referenced in Section V of this opinion regarding Nurse Amy Gimmits message to Captain Stanley.

Conviction Relief.[4] But all of this hyperbole, as in past motion practice, ignores the fact that Richard Warren survived to testify in the flesh and to identify Kevin Keith as the person who attempted to murder him—the same person who slew three occupants of that apartment on the evening of February 13, 1994. The issue for this court, and inevitably for higher courts, is whether the positive identification of Kevin Keith by Richard Warren and, parenthetically, the positive identification of Kevin Keith by Nancy Smathers, has been tainted by police misconduct. Because there is an absence of any evidence of police misconduct, there is no taint. Kevin Keith's claims to the contrary—revisited once again—find no support by any hard evidence. In short, there is really no evidence that police conduct was "impermissible suggestive" so as to give rise to the "substantial likelihood of misidentification."

In summary, then, the Defendant's claims in support of a new trial are:

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[4] The name "KEVIN" evidently is written (or hand printed, if you will) in a hand different from the apparent handwriting of Richard Warren—all of this at a time when he (Warren) was *in extremis* following surgery. Remarkably, in a *pro se* filing on December 21, 2006, the Defendant-Petitioner, referring to the trial transcript of the testimony of Warren, explains that it was not Warren who wrote "KEVIN" on the pad, but, rather, Warren's father. As the Defendant-Petition explains: Warren testified that he didn't write the name Kevin down, but that he sign [sic] language the name to his father and his father wrote the name Kevin down [citing] (Tr. P. 367-368)." The Defendant-Petitioner's reference to the trial transcript is accurate, but how this distinction casts doubt upon the essential accuracy of the Ohio Supreme Court's rendition of the facts in difficult to understand.

- The testimony of Nancy Smathers;
- The testimony of Richard Warren;
- A claim that Rodney Melton planned "to cripple" Rudel Chatman;
- A claim that Kevin Keith is the main cocaine supplier to the Meltons;
- Nurse Amy never told Captain Stanley that Richard Warren mentioned the name "Kevin";
- Captain Stanley lied under oath.

These claims will be reviewed as part of this court's findings of fact and conclusions of law.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court finds that virtually all of the claims of Kevin Keith are barred by the doctrine of res judicata, meaning that they were raised on direct appeal or could have been raised on direct appeal. Those claims that arguably center upon new evidence have been resolved against the Defendant by this court's judgment entry denying his Petition for Post Conviction Relief, as well as the affirmance of that decision by the Ohio Court of Appeals. The claims regarding the testimony of Nancy Smathers were thoroughly explored at the trial itself, under cross-examination. The claims regarding the testimony of Richard Warren, specifically that Captain Stanley lied about Nurse Amy, and inferentially that Captain

Stanley unduly influenced Warren, have been thoroughly discredited by the State's reference to the trial record. See transcript Volume 2, page 226-227: "Hi, this is Amy Gimmits, letting you know that the name of the patient—the patient has identified the assailant. I guess his first name is Kevin, *** [etc., etc]." (See page 6, State's Response in Opposition to Add to the Record by Defendant.)

The references to the Meltons were thoroughly explored at the trial. That the Meltons committed these crimes (viz., actually pulled the trigger, in lieu of Kevin Keith) is but a theoretical reed—a thin one at best.

In summary, this court finds as follows:

1. Most, if not all, of the so-called newly discovered evidence is simply not newly discovered.

2. None of the claimed newly discovered evidence is likely to change the result of this mass murder case.

3. Very little of the so-called newly discovered evidence has been discovered since the trial. In fact, what has been discovered either serves to corroborate the conviction (e.g., the name "Kevin" on a piece of paper in Richard Warren's father's handwriting, communicated via sign language by a post surgical patient) or is flatly neutral, up or down on the conviction of Kevin Keith. (e.g., letters to and/or from Chief Corwin.)

4. Most of the claimed newly discovered evidence could have been discovered in the exercise of due diligence.

5. The claimed newly discovered evidence is only remotely (if at all) material to the issues, and then merely cumulative to former evidence, but in no event does it even contradict the powerful evidence of guilt.

6. None of the material presented can be said to invoke the doctrine enunciated in Brady v. Maryland.

7. There is no evidence of police misbehavior mandating suppression of eyewitness identification; rather, this court finds under the totality of the circumstances that the evidence presented by the Defendant in his motion practice has no effect on the Ohio Supreme Court's determination that the identification in this case was reliable. And, finally

8. The combination both direct and circumstantial evidence in this case supports the finding that even were this court to grant a motion for new trial, the result would remain the same.

In conclusion, this court finds that the Defendant Kevin Keith has failed to present proof by clear and convincing evidence that he was unavoidably prevented from filing the motion within the time provided within Rule 33. The issue is also barred under the doctrine of res judicata. Furthermore, the Motion itself lacks merit. See State v. Hawkins (1993), 66 Ohio St.3d 339 at 350:

> "The decision to grant or deny a motion for a new trial on the basis of newly discovered evidence is within the sound discretion of the trial court and, absent an abuse of discretion, that decision will not be disturbed. State v. Williams (1975), 43 Ohio St.2d 88, 72 O.O.2d 49, 330 N.E.2d 891, paragraph two of the syllabus. In State v. Petro (1947), 148 Ohio St. 505, 36 O.O. 165, 76 N.E.2d 370, syllabus, this court held that: "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. ***' (Citation omitted.)"

Whether the evidence is even newly discovered remains to be seen. But there are no real probabilities that the outcome of the trial would be different. The evidence of guilt was convincing.

VI. ORDERS

1. The Defendant's Motion For Leave to File a Delayed Motion for New Trial, under Criminal Rule 33 is denied. **Final.**

2. The Defendant's Motion for Leave to Conduct Discovery is denied. **Final.**

3. The Defendant's Motion for an Evidentiary Hearing is denied. **Final.**

4. The Defendant's Motion for New Trial, pursuant to Criminal Rule 33 is denied. **Final.**

5. Any and all, ancillary motions of the Defendant are hereby denied. **Final.**

IT IS SO ORDERED, this 1st day of ~~June~~ July 2008.

/s/ Thomas P. Curran
JUDGE THOMAS P. CURRAN
On Assignment, Art.IV, Section 6
Ohio Constitution

To the Clerk of Courts: YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT UPON ALL COUNSEL OF RECORD BY ORDINARY MAIL.

/s/ Thomas P. Curran
Judge Thomas P. Curran

APPENDIX C

THE SUPREME COURT OF OHIO

Case No. 2009-0105

[Filed December 2, 2009]

State of Ohio	)
	)
v.	)
	)
Kevin Keith	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Crawford County Court of Appeals; No. 30815)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice